DATE: April 26, 1995
CASE NOS. 91-ERA-40
92 ERA-49

IN THE MATTER OF

ROBERT H. MOODY,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

Complainant Robert H. Moody alleges that Respondent, Tennessee Valley Authority (TVA), discriminated against him in violation of the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988). Moody's two complaints were consolidated for hearing. In the first, Moody contends that his safety complaints motivated TVA to engage in a series of discriminatory acts. The second complaint alleges that TVA discriminatorily suspended Moody for three days without pay.

In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) recommended dismissal of the complaints. He found the first complaint untimely and that Moody did not show that his protected activities motivated the suspension that was the subject of the second complaint. The ALJ's findings of fact, R. D. and O. at 3-10, are supported by the record and I adopt them. The ALJ's R. D. and O. is affirmed, as modified below.

ANALYSIS

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I. Timeliness of the 1990 complaint

At the time Moody filed these complaints, the ERA provided that an employee has thirty days after a violation of the employee protection provision to file a complaint with the

Secretary of Labor. 42 U.S.C. § 5851(b)(1) (1988). [1] In a November 9, 1990 complaint, Moody alleged that TVA engaged in a continuing pattern of discriminatory actions that included returning him to his regular position and rate of pay after a temporary assignment at a higher rate, and rating his performance marginal on one aspect of his work in three different service reviews (performance ratings). According to the complaint, the course of discriminatory actions culminated in one incident that occurred within 30 days of filing the complaint: requiring Moody to retake the Nuclear Accreditation Bonus (NAB) examination. [2]

CX (Complainant's Exhibit) 1. The timeliness of an ERA complaint may be preserved under the continuing violation theory "where there is an allegation of a course of related discriminatory conduct and the charge is filed within thirty days of the last discriminatory act." *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Final Dec. and Order, Sept. 17, 1993, slip op. at 13; *Garn v. Benchmark Technologies*, Case No. 88-ERA-21, Dec. and Order of Rem., Sept. 25, 1990, slip op. at 6. *See also Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986) (under Title VII of the Civil Rights Act of 1964).

It is undisputed that all of the electricians in the maintenance organization, including Moody, were required to be reexamined in order to continue to receive the NAB. Further, Moody took the exam, passed it, and continues to receive the NAB. R. D. and O. at 3-4. Moody complained that a mechanical instructor administered his exam, whereas an electrical instructor administered the exam to his coworkers. R. D. and O. at 3. Moody contends that he was at a disadvantage if he had needed an explanation of a test question. *Id.* Moody conceded that he was on sick leave the day the other workers took the exam. T. 336; R. D. and O. at 4.

In view of the fact that Moody was treated like all other electricians in having to retake the exam, that he passed the exam and that he receives the NAB, I find that requiring him to retake the NAB examination was not an adverse action. *See* R. D. and O. at 11. I therefore find that Moody did not establish a *prima facie* case of an ERA violation concerning the recertification exam. *See Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 9-10 (to establish a prima facie case, ERA complainant must show, *inter alia*, that the employer took some adverse action against him),

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*pet. for review docketed*, No. 95-1729 (8th Cir. Mar. 27, 1995). The ALJ's [Recommended] Decision and Order on Motion for Summary Judgment, granting Respondent's motion on the NAB issue, is accepted.

The only adverse action alleged to have occurred within the limitation period was the retaking of the NAB exam. The ALJ found that since Moody did not establish that any adverse action occurred within the limitation period, the complaint was untimely as to all of the other acts of alleged discrimination in the 1990

complaint. R. D. and O. at 11. The issue appears to be one of first impression in a whistleblower case under either the ERA or analogous statutory employee protection provisions.

In an analogous case alleging a continuing violation of Title VII of the Civil Rights Act of 1964, a court explained that whereas "[t]he discriminatory act occurring within the time period need not constitute a legally sufficient Title VII claim in itself," it nevertheless "must be an act of discrimination or it cannot share commonality with the preceding acts on the most important characteristic of all -- that the acts are related acts of discrimination." *Mascheroni v. Board of Regents of the Univ. of California*, 28 F.3d 1554, 1561-62 (10th Cir. 1994). [3] In that case, the plaintiff conceded at oral argument that the one act that occurred within the limitation period was not based on his national origin and did not violate Title VII. *Id.* Accordingly, the court found that the continuing violation theory did not apply and the complaint was untimely.

In this case, since the NAB recertification was not adverse to Moody, it could not be an incident of discrimination. Therefore, no commonality of discrimination with the other incidents of which Moody complained can be established. Accordingly, I find that the continuing violation theory does not make the complaint timely as to any of the alleged incidents of discrimination that occurred outside the 30-day limitation period.

The allegation concerning the NAB reexamination is dismissed for failure to establish a *prima facie* case of an ERA violation. The allegations as to the other incidents of discriminatory actions are dismissed for lack of timeliness. Accordingly, the entire 1990 complaint is dismissed.

II. The 1992 Complaint

TVA suspended Moody without pay for three days in April 1992. Assuming that Moody established a *prima facie* case of an ERA violation, the ALJ found that TVA met its burden of articulating a legitimate, nondiscriminatory reason for the suspension -- Moody was found asleep on the job. R. D. and O. at 16. The ALJ further found that Moody did not sustain his burden of establishing that the reasons TVA articulated for the

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suspension were pretextual or that the real reason for the suspension was his protected activities. The ALJ recommended dismissal of the 1992 complaint. R. D. and O. at 17.

I agree with the ALJ that Moody did not establish that the reasons TVA gave for the suspension were a pretext, or that the real reason was his making safety complaints. [4] R. D. and O. at 16-17. Rather, I am convinced that TVA suspended Moody for sleeping on the job. Accordingly, Moody has not prevailed on the merits of his May 1992 complaint.

CONCLUSION

The complaints are DISMISSED.

SO ORDERED.

ROBERT B. REICH

Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]
Moody filed his complaints on November 9, 1990 and May 12, 1992. Section 2902(b) of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, amended the time period for filing a complaint to 180 days for claims filed on or after its enactment, October 24, 1992. See Section 1902(i) of Pub. L. No. 102-486. Therefore, the 30-day limit applies to this case.

[2] The NAB is a monthly bonus paid to eligible electrical maintenance craftsmen. R. D. and O. at 3.

[3] *See also Martin v. Nannie and the Newborns, Inc.*, 3 F.2d 1410, 1415 (10th Cir. 1993) (under Title VII, continuing violation theory does not require that the alleged incidents that occurred within the time limitation be sufficient, standing alone, to comprise a claim for hostile work environment in a sexual harassment case).

[4]
Since TVA presented evidence to rebut a prima facie case of an ERA violation and the ALJ considered the entire record in reaching his recommended decision, the question whether Moody established a *prima facie* case does not merit discussion. *See Carroll*, slip op. at 11-12.